SUPREME COURT, U.S.

FILED

G. ROBERT BLAKEY, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1161

A. L. [redacted], et al.,
Petitioners,

versus

FIRST AMERICAN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals For The
Fifth Circuit

[redacted]
1400 City National Bank Building
Birmingham, Alabama 35203
[redacted]
515 Brown-Marx Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Of Counsel
[redacted]
HOWARD WALTHALL
NEWMAN, LEIDESDORF & PATRICK
1400 City National Bank Building
Birmingham, Alabama 35203

St. Louis Law Printing Co., Inc., 415-17 N. Eighth St. [redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

A. L. GARNER, et al.,
Petitioners,

versus

FIRST AMERICAN LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals For The Fifth Circuit

Petitioners A. L. Garner, *et al.* (plaintiffs and appellees below) pray for a Writ of Certiorari to review the August 31, 1970 opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order below of District Judge H. H. Grooms is reported at 280 F. Supp. 1018 (N. D. Ala. 1968) and is reproduced *infra*, at p. commencing A-1. The opinion below of the Court of Appeals is reported at 430 F. 2d 1093 (5th Cir. 1970) and is reproduced *infra*, at p. commencing A-3.

JURISDICTION

The Court of Appeals decision below was filed on August 31, 1970. Petitioners' Petition for Rehearing, filed September 12, 1970, was denied below without opinion on September 29, 1970. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals decision below impose undue and improper burdens upon the federal judiciary by requiring, in stockholder litigation asserting federally created rights, that the district courts must independently "weigh" the various competing interests and determine on a case-by-case basis whether the attorney-client privilege is available to the corporation against its own stockholders?

2. Does the Court of Appeals decision below establish improper, vague and unworkable standards to be applied by the district courts in determining whether the attorney-client privilege is available to the corporation against its own stockholders, including such "indicia" as the number of shareholders, the percentage of shares owned by plaintiff-stockholders and the extent to which the plaintiff-stockholders are thought to be "blindly fishing," and including the Court of Appeals' statement that the district court:

> "must take full account of the reasons for any asserted privilege, including any especially strong policies of the state in which the court sits. But it must take account of federal interests as well."

3. Does the Court of Appeals decision below erroneously resurrect the requirement of "good cause" for the production of documents (where plaintiff stockholders seek pro-

duction of communications between the corporation's attorney and its officers which occurred prior to institution of suit), notwithstanding the 1970 amendments to the Federal Rules of Civil Procedure (effective prior to the Court of Appeals decision below), which eliminated the requirement of good cause?

4. Does the Court of Appeals decision below erroneously impose upon stockholder-litigants the burden of showing good cause for the production of documents, notwithstanding the 1970 amendments to Rule 26(c), which imposes upon the party from whom production is sought, the burden of showing good cause for any protective order?

5. In stockholder litigation involving both derivative claims brought under the federal securities acts for the benefit of the corporation, and direct claims, for purchaser under the federal securities acts against the corporation and its officers and directors, may the corporation shield its officers (or attorneys) by asserting the attorney-client privilege against its own stockholders with regard to communications between the corporation's management and the corporation's attorney which occurred prior to the institution of the litigation?

6. Is the attorney-client privilege available to a corporation, notwithstanding the fact that it is not a natural person?

RELEVANT STATUTES AND RULES

Rule 26(b)(1) of the Federal Rules of Civil Procedure (as recently amended) is reproduced *infra* at p. A-23.

Rule 26(c) of the Federal Rules of Civil Procedure is reproduced *infra* at p. A-24.

Rule 34 of the Federal Rules of Civil Procedure, as it existed prior to recent amendments, is reproduced at *infra* at p. A-24.

Rule 43(a) of the Federal Rules of Civil Procedure is reproduced *infra* at p. A-25.

Section 46 of the Alabama Business Corporation Act is reproduced *infra* at p. A-26.

Section 438, Title 7, Code of Alabama of 1940 is reproduced *infra* at p. A-27.

Title 1, § 3, Code of Alabama (1940) is reproduced *infra* at p. A-27.

STATEMENT OF THE CASE

Petitioners (plaintiffs below) purchased and now hold stock of First American Life Insurance Company (hereinafter "First American"). In their complaint below, petitioners sought refund of the purchase price paid by them for their First American stock or damages, and also sought a money judgment for the benefit of First American.

The amended complaint alleged: (1) that First American securities were not registered with the S. E. C. as required by the Securities Act of 1933, prior to being offered and sold; (2) that the securities issued by First American were offered and sold in violation of the registration and antifraud provisions of the Securities Act of 1933, Securities Exchange Act of 1934, S. E. C. Rule 10b-5, Investment Company Act of 1940, and the Alabama Securities Act; and (3) that the defendants participated in the violations and in a conspiracy to violate the federal and state laws.

In pretrial discovery proceedings, the District Court treated plaintiff's *subpoena duces tecum* as a motion to produce and ordered production by First American of certain documents. First American refused, however, to produce some of the documents ordered produced, on the ground that the documents withheld were privileged communications with its attorneys. It also asserted the attorney-client privilege as a basis for the refusal of R. Richard Schweitzer, its President and former attorney to testify on pretrial deposition concerning certain communications between him (when acting as First American's attorney) and First American officers and directors.

Schweitzer's name and the name of his law firm had appeared in certain First American prospectuses, alleged to be misleading and deceptive, which were used in selling First American stock to plaintiffs. The prospectuses rep-

resented that the law firm had passed upon "the legality of the issue of common stock, as well as certain other legal matters." At the time of his deposition, Schweitzer was temporarily acting as President of First American. All communications sought by plaintiffs occurred prior to the institution of the present action, and all occurred prior to Schweitzer's becoming President of First American. All communications sought occurred during the allegedly illegal offering, some at times when the prospectuses bearing Schweitzer's name and the name of his law firm, were being used to sell stock.

The plaintiffs moved for an order requiring production of the written communications which had been withheld and requiring answers by Schweitzer to questions concerning his written and oral communications with First American's officers during the stock offering. Plaintiff's verified motion asserted on information and belief that the evidence sought was relevant to petitioners' action.[1] This was **not** controverted by First American. First American did **not** question the good faith of plaintiffs in seeking the information, or assert any question of trade secrets or the like.

The pretrial deposition of W. Stacy Branum, former president of First American, and exhibits to his deposition from business records of First American and an affiliated corporation, confirmed the allegations of the complaint

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[1] Whatever the corporate attorney's answer to the questions propounded, his testimony would clearly be relevant. On the one hand, if the attorney testifies that he did advise defendant officers and directors that the SEC had refused to grant a no action letter, his testimony with regard to that fact would clearly be relevant to the liability of the officers and directors in continuing with the public offering of First American securities. On the other hand, if the attorney testifies that he did **not** advise the officers and directors, and that he did not take steps to prevent further use of the prospectus, then the attorney and his law firm, who were named in the prospectus might themselves be liable.

and amended complaint below; including Petitioners' allegations concerning payoffs to state officials with regard to First American's stock offering and Petitioners' allegations concerning misrepresentations with respect to First American's financial condition. Four witnesses, including another former officer of First American, had in pretrial depositions in this action refused to answer Petitioners' questions and had with respect to those questions asserted witnesses' constitutional privilege against self-incrimination. Each of those depositions was on file with the district court at the time of the district court's order below, and each of those pretrial depositions was part of the record of the court of appeals below. Thus it was a matter of record at the time of the district court order below that Petitioners (plaintiff-stockholders below) had encountered obstacles in ascertaining facts relevant to their complaint, and it was a matter of record at the time of the district court order below (based upon Branum's testimony and exhibits thereto) that there was at least probable cause for Petitioners' allegations of misconduct, misrepresentations and omission to disclose material facts.

Plaintiffs took the position in the courts below that First American's attorneys had been paid to act as attorneys for all First American stockholders, and that Schweitzer and his law firm had undertaken to act as attorneys for the benefit of all investors who might see and rely on First American's prospectuses.[2] Plaintiffs con-

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[2] See Bittker, "Professional Service Organizations: A Critique of the Literature, 23 Tax Law Review 429 at 430, fn. 1 (May, 1968):

> "Query: Who is the 'client' when a professional opinion is rendered in a . . . public offering of stock, et cetera? If the 'client' includes all those relying on such an opinion how are such limitations on liability to be 'made apparent' to them?"

Accord, **Fischer v. Kletz**, 266 F. Supp. 180 (S. D. N. Y. 1967), quoting with approval the following language from **In the Mat-**

tended that First American should not be permitted to shield its officers (or its attorneys),[3] withhold material facts from the court and from its own stockholders, or assert the attorney-client privilege against its own stockholders. Petitioners contended in the court below that the attorney should not be permitted to prefer one client over another, withholding facts from some of the persons for whom he and his law firm had undertaken to act as attorneys.

On hearing in the district court below, District Judge H. H. Grooms held that "the privilege here claimed is not available as against the plaintiff stockholders," citing English precedents and Section 3 of Title 1 of the Code of Alabama of 1940, which adopts the common law.

First American then took an interlocutory appeal pursuant to 28 U. S. C. § 1292(b) to the Court of Appeals for the Fifth Circuit. The Court of Appeals reversed the district court's ruling, remanded the case for an evidentiary hearing on the question (but failed in its opinion to set out adequate guidelines), and taxed costs of the appeal against the stockholders (Petitioners in this Court). The Court of Appeals held that the corporation had no absolute right to claim the privilege against its own stockholders (thereby disagreeing with the contention advanced by the American Bar Association in an *amicus curiae* brief), but held that the stockholders had to establish good cause for the production of communications between the corporation and its attorneys, and remanded, holding that in stockholder litigation arising under the Federal Securities Acts, the district court must examine the facts and circumstances

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ter of Touche, Niven, Bailey & Smart, 37 S. E. C. 629 at 670-71 (1957):

> "[The accountant who certifies a financial statement owes a responsibility] not only to the client who pays his fee, but also to investors, creditors and others who may rely on the financial statements which he certifies."

[3] See footnote 1, *supra*.

of each case individually, giving some undefined weight to the state law creating the privilege and such factors as the number of shares owned by the plaintiffs, and whether the plaintiffs appear to be engaged upon a "fishing expedition." The Court of Appeals noted in its opinion that communications made by a client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged, and noted that communications between an attorney and two or more parties having a common interest are not privileged in an action brought by one against the other. The Court of Appeals below erroneously stated that petitioners had made no claim that a corporation could never assert the attorney-client privilege.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that this Court should grant certiorari in order to review and revise the decision of the Court of Appeals for the Fifth Circuit. The decisions below are the first in any state or federal court in the United States to consider the question whether the attorney-client privilege may be asserted by a corporation against its own stockholders in litigation brought by stockholders charging the corporation and its officers and directors with acts injurious to their interests as stockholders. The Court of Appeals in its decision below correctly characterized this as an "important question." Petitioners respectfully submit that this question should be decided by this Court because of important implications to the public, investors, the business community, and attorneys who represent corporate clients. Petitioners further submit that the decision below should be reviewed and revised because it creates unnecessary confusion, imposes undue burdens upon the federal district courts and improperly restricts discovery of facts in stockholder actions brought under the federal securities laws.

I. The Decision Below Should Be Reviewed by This Court Because It Imposes Undue Burdens on the Federal Courts by Requiring District Courts to Hold Evidentiary Hearings in Stockholder Litigation Under the Federal Securities Acts to Determine on a Case-by-Case Basis Whether the Attorney-Client Privilege Is Available to the Corporation Against Its Own Stockholders; It Improperly Requires a Showing of "Good Cause" by Stockholders to Overcome the Privilege; and Requires District Courts to "Balance" the Public Interests Involved in Case-by-Case Decisions, and to Give Some Undefined Weight to State Law in Determining Whether the Privilege May Be Asserted by the Corporation Against Its Stockholders.

The Court of Appeals asserts in its opinion below that "the attorney-client privilege still has viability for the corporate client" but would permit "stockholders to show cause why it should not be invoked in the particular instance." The opinion appears to require trial courts to "balance the interests" in each case with respect to all the facts and circumstances in determining when the attorney-client privilege shall be available to the corporation. The decision below, if allowed to stand, will impose an awesome burden on the district courts in the following respects:

A. This action arises under federal statutes, rather than state law. The Court of Appeals held below that the district court was to apply federal rather than state law in determining whether the privilege could be asserted. The Court of Appeals then somewhat inconsistently stated: "This is not to say that state interests play no part." The opinion below suggested that the question whether the attorney-client privilege was available to First American was to be decided by the district court "only after consideration of state and federal interests that are inseparable from the factors bearing on the availability of the privilege

itself." That test, if it be a test, is one which district courts cannot apply with certainty because it requires the district court to "consider" state law in reaching its decision, but fails to set forth guidelines and fails to specify the weight, if any, to be given state law.

B. The opinion of the Court of Appeals fails to establish any judicial standards to be applied by trial courts in deciding, in shareholder litigation under the Federal Securities Acts, when and under what circumstances a corporation may assert the attorney-client privilege as to communications between itself and its attorney. The Court of Appeals held that an evidentiary hearing must be held by the trial court, and its opinion sets forth a number of "factors"—including the number of shares of stock held by plaintiffs—which the trial court should "weigh" in reaching its decision as to whether to allow the claim of privilege. It is submitted that the uncertainty of the standards to be applied will result in further delays and appeals in the action below and will encourage further litigation and delays in other stockholder actions in the federal courts, and that the necessity for evidentiary hearings by the trial courts constitutes a heavy and wholly unnecessary burden on trial courts already heavily burdened.

C. The suggestion by the Court of Appeals that trial courts can freely use *in camera* inspection of disputed documents and other evidence fails to take into account the fact that the district judge in stockholder cases is not familiar with and cannot be expected to be familiar with all the corporate records and may well overlook the relevance of a document innocent on its face but of great significance to one with knowledge of other corporate records. *In camera* inspection by a trial court could be useful in suits between stockholders and their corporation and its officers and directors only if the trial court were intimately familiar with all the corporate records and documents. It follows that *in camera* inspection cannot be useful in a

suit of this nature, for it would impose impossible burdens upon the trial court.

D. The opinion below takes the position that the availability of the attorney-client privilege is subject to the right of stockholders to show cause why it should not be invoked in the particular instance, thereby imposing on stockholders the burden of proving special facts and circumstances which would entitle them to disclosure of communications asserted to be privileged. The decision below flies in the face of recent amendments to Rule 34 which eliminates the requirement of good cause.[4] This requirement imposes a burden on the trial court as well, for it must hold an evidentiary hearing to determine whether stockholders have shown cause sufficient to overcome the privilege asserted by the corporation.

E. The standards created by the decision below, and the reference to "fishing expeditions" are inconsistent with the liberal discovery provisions of the Federal Rules and this Court's holdings. As this Court stated in the landmark decision of **Hickman v. Taylor**, 329 U. S. 495 at 507 (1947):

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either

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[4] As noted in the Advisory Committee's Explanatory Statement concerning Amendments of the Discovery Rules, 48 F. R. D. 487 at 526:

> "Rule 34 is revised . . . (1) to eliminate the requirement of good cause. . . ."
>
> ". . . Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought. . . ."

party may compel the other to disgorge whatever facts he has in his possession."

F. Rule 26(c) of the Federal Rules of Civil Procedure provides that the burden of showing good cause for a protective order is on the party from whom discovery is sought, rather than on the party seeking discovery. That rule permits appropriate safeguards for a corporation from which disclosure is sought by its stockholders when "trade secrets" are sought or when the corporation can demonstrate that the information is sought for an improper purpose. The Court of Appeals below erred in reversing the district court and in imposing the burden of showing good cause upon the stockholders seeking discovery notwithstanding Rule 26(c), notwithstanding the Court of Appeals ruling below that the attorney-client privilege was not absolute, and notwithstanding the fact that First American had not contended or demonstrated in the district court below that there was any basis for a protective order other than First American's claim that it had an absolute right to assert the attorney-client privilege against its own stockholders.[5]

G. The district courts will stagger under the weight of the decision of the Court of Appeals in this case. The Court of Appeals below has improperly required the district courts, on a case-by-case basis, to "balance the interests" between fostering the attorney-client privilege, on the one hand, and the benefits to be gained from permitting the courts and stockholder-litigants access to all the facts, on the other. The Court of Appeals has failed to provide adequate standards to guide district courts in making such determinations. If the trial courts are to dispose of litiga-

[5] In petitioners' brief below, it was pointed out that the trial court's order requiring production of documents withheld had necessarily involved a finding of "good cause" then required by Rule 34, since the trial court had treated the *subpoena duces tecum* as a motion for production.

tion efficiently and in due course, they must be given definite judicial standards whereby to decide whether, when and under what circumstances such a privilege might be asserted.

The proposed Rules of Evidence for the United States District Courts and Magistrates, published March 12, 1969, 46 F. R. D. 161, would recognize a privilege for corporations as against third persons but do not deal with or establish standards for determining whether the privilege may be asserted by the corporation against its own stockholders. There are exceptions for "joint clients" and for communications in aid of crimes or fraud.

II. The Decisions Below Present the Novel Question, Never Before Decided by an American Court, Whether a Corporation May Invoke Against Its Own Stockholders the Attorney-Client Privilege as to Communications Between the Corporation's Management and Its Attorney.

The question whether a corporation may assert the attorney-client privilege against its own stockholders was apparently never raised and resolved in a reported decision in any state or federal court in the United States prior to decision by Judge H. H. Grooms of the United States District Court for the Northern District of Alabama in the instant case. Judge Grooms held that a corporation could not assert the attorney-client privilege against its own stockholders, relying upon the two English cases discussed immediately hereinbelow.

In **Gouraud v. Edison Gower Bell Telephone Company of Europe, Limited,** 57 L. T. Ch. 498, 59 L. T. 813 (1888), the court held that a corporation has no privilege to refuse to reveal to its shareholders communications between the corporation and its legal counsel with regard to the management and administration of the corporation, because the directors, when obtaining legal advice, were acting on be-

half of the company as a whole. The English court reasoned that the relationship between the directors, management, and controlling stockholders of a corporation, on the one hand, and minority stockholders of the corporation, on the other, is analogous to the relationship between a trustee and his beneficiaries[6] in which no attorney-client privilege can be asserted by the trustee against the beneficiaries,[7] or is analogous to the relationship between two partners or clients who jointly hire a common attorney,[8] neither of whom may assert the privilege against the other.[9]

In **Dennis & Sons, Ltd. v. West Norfolk Farmers Manure & Chemical Company, Ltd.**, 2 All E. R. 94, 112 L. J. Ch. 239, 169 L. T. 74, 59 TLR 298, 89 Sol. Jo. 211 (1943), the court held that a corporation could not assert an accountant-client privilege against its shareholders, relying on the **Gourand** case.

The decision of Judge Grooms in this action has been expressly approved and followed by other District Courts. See **Fischer v. Wolfinbarger**, 45 F. R. D. 510 (W. D. Ky. 1968); **Dahlke v. Morrison**, CCH Fed. Sec. L. Rep. ¶ 92,490 (N. D. Ala., Oct. 3, 1969); **Fischer v. Wolfinbarger**, C. A. Nos. 5911 and 5919 (M. D. Tenn., Aug. 29, 1969); **Hogan**

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[6] Accord. **Twin-Lick Oil Co. v. Marbury**, 91 U. S. 587, 588 (1876); **Southern P. Co. v. Bogert**, 250 U. S. 483, 492 (1919); **Jackson v. Ludeling**, 21 Wall. 616, 624 (1874); **Taylor v. Standard Gas & Elec. Co.**, 306 U. S. 307 (1939); **Pepper v. Litton**, 308 U. S. 295 (1939).

[7] **Talbott v. Marshfield**, 2 Dr. & Sm. 549 (1865); Scott, Law of Trusts (2d ed.), p. 1294.

[8] See **Baltimore & Pot. R. Co. v. Fifth Baptist Church**, 108 U. S. 317 (1883): "Private corporations are but associations of individuals united for some common purpose and permitted by law to use a common name, and to change its members without a dissolution of the association."

[9] **Parish v. Gates**, 29 Ala. 254 (1856); **Grand Trunk Western R. Co. v. H. W. Nelson Co.**, 116 F. 2d 823 (6th Cir. 1941).

v. Teledyne, Inc., C. A. 69-C 1941 (N. D. Ill. Order of Chief Judge Robinson requiring answer by Teschke, April 22, 1970); **Epstein v. Weiss**, C. A. 67-233 (E. D. La., N. O. Div., May 13, 1970).[10] No decision to the contrary (except for the decision below of the Court of Appeals) has been discovered.

Although never raised in the United States prior to the instant cases, the novel question presented is an important one, as evidenced by the fact that the American Bar Association and its Section of Corporation, Business and Banking Law filed a lengthy *amicus* brief and argued orally for permitting the privilege to be asserted by First American against its own stockholders. In its *amicus* brief, the American Bar and its Section of Corporation, Business and Banking Law argued that the attorney-client privilege promotes "freedom of consultation" with attorneys and that compulsory disclosure of communications between attorneys and their corporate clients would as a practical matter inhibit consultation with attorneys. The American Bar Association argued that a corporation is a distinct entity, to be considered as separate and apart from the individuals who own its stock, and that the attorney-client privilege should be absolute as to all communications between the corporation and its attorney, even those involving future corporate actions which might be criminal.

Petitioners insisted in the courts below that there should be no right to withhold from stockholders communications from or to the corporation's attorney, in an action brought by stockholders against the corporation and its management.

The questions raised by the decision below are important and will recur time and again. Recent years have

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[10] See also **Patti Lea, Inc. v. District Court**, 423 P. 2d 27 (Supreme Ct. of Colo. *en banc* 1967), in which a corporation was held not to have the right to assert a statutory accountant-client privilege against its own stockholder.

seen increasing resort to the federal courts and to the protections afforded the public and investors by the Federal Securities Acts. The problem may arise in other contexts. The corporate attorney's testimony concerning his advice to management with regard to the federal antitrust laws may be critically important in stockholder litigation seeking indemnification from corporate officers and employees for civil and criminal penalties imposed on the corporation. The corporation's right to indemnification was recently recognized in **Wilshire Oil Co. v. Riffe**, 409 F. 2d 1277 (10th Cir. 1969), **noted**, 83 Harv. L. Rev. 943 (1970).

There is a compelling need for clarification by this Court concerning the corporate attorney's duty and relationship to stockholders, the duty and relationship of attorneys whose names appear in prospectuses to investors who rely on those prospectuses, and whether a corporation may shield its officers (or attorneys) by concealing and withholding from its stockholders communications between the corporation's officers and its attorneys. These questions are of pervasive importance to all investors, the corporations in which they invest, and the attorneys who represent corporate clients.

III. This Court Should Grant Certiorari to Decide the Important Question Whether a Corporation, Which Is Not a Natural Person, May Assert the Attorney-Client Privilege.

The Court of Appeals opinion below erroneously states that "there is no contention by plaintiffs that FAL [First American] is outside the ambit of the attorney-client privilege because a corporation is not a client." Pages 28-29 of plaintiff's Reply Brief filed with the Court of Appeals on December 6, 1968, argued that a corporation could not assert the privilege, because it was not a natural person.

The question whether the attorney-client privilege is available to a corporation was recently raised from the bench by Mr. Justice White in oral argument on December 16, 1970 in **Decker v. Harper & Row Publishers, Inc.**, Case No. 113, 1970 Term. That question had apparently never before been argued on the merits before this Court. The Government apparently conceded, in **United States v. Louisville & Nashville R. R.**, 236 U. S. 318 (1915), that the attorney-client privilege may be asserted by a corporation.[11]

In **Radiant Burners, Inc. v. American Gas Association**, 207 F. Supp. 771 (N. D. Ill. 1962), **reversed**, 320 F. 2d 314 (7th Cir. 1963), **cert. denied**, 375 U. S. 929 (1963), the district court held that the attorney-client privilege may be asserted only by natural persons. The district court reasoned that the attorney-client privilege was an exception to the general rule favoring full disclosure of the truth, and that the only justification or *raison d'etre* for the privilege was to assure accused individuals of a fair trial. The Court of Appeals for the Seventh Circuit reversed, holding that "history, principle, precedent and public policy" support the extension of the attorney-client privilege to corporations. The Seventh Circuit held, however, that because the attorney-client privilege is an exception to the general duty of disclosure, the privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle." This Court then denied certiorari, but the denial of certiorari imports no expression of opinion by this Court upon the merits of a decision below. **Daniels v. Allen**, 344 U. S. 443 (1953).

More recently, this Court held in **George Campbell Printing Corp. v. Reid**, 392 U. S. 286 (1968), that the

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[11] The proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F. R. D. 161, would create a federal attorney-client privilege for corporations. We respectfully submit that the proposed Rules should be altered in this respect.

privilege against self-incrimination is "essentially a personal one, applying only to natural individuals" and is not available to a corporation. If a corporation, which may be convicted of a crime, is not entitled to the privilege against self-incrimination, we respectfully submit that there is no sound basis for affording it an attorney-client privilege.

In view of the **Campbell** decision, we think that a review of the decision by the Court of Appeals in the instant case is imperative. The question recently posed by Mr. Justice White concerning whether a corporation may invoke the attorney-client privilege is of great importance. This Court should decide that question.

IV. This Court Should Grant Certiorari Because One of the Issues Raised Herein Would Be Dispositive of Decker v. Harper & Row Publishers, Inc., No. 112, 1970 Term, Now Under Submission in This Court.

Petitioners respectfully submit that certiorari should be granted because one of the issues presented herein would be dispositive in **Decker v. Harper & Row Publishers, Inc.**, 1970 Term, orally argued December 16, 1970 and now under submission in this Court.

The question presented to this Court for ruling in **Decker** is whether a corporation's attorney-client privilege extends to narrative statements solicited by corporate counsel from non-management employees concerning their prior testimony before a grand jury.

In the course of oral argument in **Decker** on December 16, 1970, Mr. Justice White from the bench raised the question whether a corporation, which is not a natural person, may ever assert the attorney-client privilege. That question was not the principal thrust of petitioners' posi-

tion in **Decker**, although raised by the parties and probed by the Court in oral argument. The question is presented in the present petition and, if answered in the negative, would be dispositive in **Decker**. A decision by this Court that a corporation may not assert the privilege would eliminate the necessity for consideration by this Court and the lower courts of such "nice" and time-consuming questions as whether particular employees are "management" or "non-management employees," and whether, after "weighing" all factors involved, stockholder-plaintiffs have shown "good cause" for production of correspondence with their corporation's attorney, whose attorney fees were paid with stockholders' money.

CONCLUSION

For the reasons stated hereinabove, we respectfully submit that this Court should grant Certiorari to review the August 31, 1970, decision of the Court of Appeals for the Fifth Circuit.

J. VERNON PATRICK, JR.
1400 City National Bank Building
Birmingham, Alabama 35203

MARVIN CHERNER
516 Brown-Marx Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Of Counsel
CHERVIS ISOM
HOWARD WALTHALL
BERKOWITZ, LEFKOVITS & PATRICK
1400 City National Bank Building
Birmingham, Alabama 35203